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91-818

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ZACHARY KAI ADLER,
Petitioner,
vs.
KAISER FOUNDATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a brain damaged minor is denied a Due Process right to court supervision and approval of his contracts if the court enforces an unapproved stipulation to submit the minor's case to binding arbitration thereby waiving the substantial rights of a jury trial and appeal.

LIST OF PARTIES

The parties to the proceedings below included the petitioner herein, Zachary Kai Adler, a minor, by and through his guardians ad litem Kai Adler and Beverly Adler, and respondent Kaiser Permanente Hospital.

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No._____

In The

Supreme Court of the United States

October Term 1991

ADLER,

Petitioner,

v.

KAISER,

Respondent.

Petition For Writ Of Certiorari To The First Appellate District Court Of Appeal Of The State Of California

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The California Supreme Court's denial of the Petition for Review (App. A) is not reported. The decision of the First Appellate District Court of Appeal (App. B) is also not reported.

JURISDICTION

The decision of the District Court of Appeal was issued on May 15, 1991. A timely petition for rehearing was denied on June 5, 1991. A timely Petition for Review filed with the Supreme Court of California was denied on August 14, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

STATEMENT

1. The Case

Zachary Kai Adler was born on August 19, 1982. He suffered brain damage during the delivery. Delay by the doctor in doing a Caesarean Section caused hypoxia and brain damage. The child is now permanently injured and is unable to speak or walk. This condition will remain for life.

The docter who performed the delivery was employed by defendant Kaiser Foundation Health Plan, Inc. (Kaiser). A medical malpractice action was filed. The case was steadily and moving toward a jury trial in the Sonoma County Superior Court of California.

2. Kaiser's Procedural Maneuver Fails to Get the Case Out of a Jury Trial and Into Arbitration.

At the onset of the case, Kaiser unsuccessfully tried legal procedural maneuvers to get this matter into arbitration. The Court of Appeal affirmed the ruling of the Superior Court denying Kaiser the right to binding arbitration in this case. This case was to go to trial.

3. An Unapproved Minor's Agreement Took This Case Into Binding Arbitration

As the case moved toward the final months before the date set for a jury trial, it was sidetracked into binding arbitration. A stipulation to enter into **binding** arbitration was entered into by the guardians ad litem.

The stipulation was not reviewed by the court to determine if it was in the best interests of the minor. No inquiry by the court was made into whether the minor's rights were adequately protected.

This stipulation was the same as settling the minor's case. It waived a trial in the Superior Court, it waived a jury, and it waived the safeguards of an appeal in the California Judicial system. All this was **exchanged** for binding arbitration without appeal. To

be binding on the minor, in California, an agreement to compromise a minor's claim by the guardian ad litem on behalf of a minor must be reviewed by petition or hearing before a Judge of the Superior Court. This was not done. Without court approval, this was not binding on the minor.

This minor has been denied due process.

4. The Court of Appeals Affirms

The arbitration decision was adverse to the minor. Kaiser sought to have the arbitration decision against the minor converted into a judgment. The minor, in writing, disavowed the contract (stipulation). Over the minor's formal objections the judgment was entered in the Superior Court in favor of Kaiser and against the minor.

The minor appealed to the First Appellate District Court of Appeal challenging the Superior Court's enforcement of a non-court approved minor's contract. This violated the minor's right to Due Process as guaranteed by the Fourteenth Amendment and the California Constitution. On May 15, 1991 the Court of Appeal issued its decision upholding the binding effect of the non-court approved minor's contract. The Court of Appeal stated that the minor did not have the right to court supervision and approval of such a contract to deprive the minor of his

rights to a jury trial and appeal. The Court of Appeal pointed out that in California there is a distinction between minor's contracts and minor's agreements to procedural matters. A petition for rehearing was denied on June 5, 1991. On August 14, 1991 the Supreme Court of California denied the minor's petition for review.

REASONS FOR GRANTING THE WRIT

1. California's Practice Conflicts With Constitutional Principles Articulated by This Court.

In *Thompson v. Maxwell Land Grant & R. Co.*, 168 U.S. 451, 466 (1897), This Court Said:

> "The Best Interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation, and **with the approval of the appropriate tribunal** shall be binding upon them in similar actions" (emphasis added).

While procedural due process is not the unwavering equivalent of a hearing (*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12-13 (1979)), a minor's deprivation of his right to a trial, a jury, and to an appeal must require more than the perfunctory court review sanctioned by California.

California Code of Civil Procedure § 372 conflicts with the minimal due process requirements of the Fourteenth Amendment. Code of Civil Procedure § 372 provides:

> "The guardian ... Of the estate or guardian ad litem so appearing for the minor, ... Shall have power, **with the approval of the court** in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein ..., And to ... Release or discharge any claim of the ward ... Pursuant to such compromise" (emphasis added).

The Court of Appeal rejected the argument that Code of Civil Procedure § 372 required court approval of a guardian ad litem's decision to submit the minor's claim to binding arbitration, thereby waiving the substantial rights of a trial, a jury, and an appeal.

Code of Civil Procedure § 372 thus invests a guardian ad litem with the **personal authority** to bind a minor to arbitration. No judicial inquiry into whether this diversion from the judicial arena to the arbitral arena is in the best interest of the minor is required under California law. This is a deprivation of due process under the Fourteenth Amendment. A minor deserves more process than this.

This Court has said that "[b]ecause of the broad spectrum of concerns to which the term [due process] must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing risk of error." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979).

"It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called to measure and weigh their interests. The guardian ad litem is but an officer of the court." *Dacany v. Mendoza*, 573 F.2d 1075, 1079 (1978); see *Dixon v. United States*, 197 F.Supp. 798, 803 (1978); *Leonard v. Rose*, 422 P.2d 604 (1967); *Berry v. Chaplin*, 169 P.2d 442, 447 (1946); *Cloud v. Market Street Ry.*, 168 P.2D 191 (1946); *Benson v. Williams*, 149 P.2d 549 (1944); *Kuykendall v. Zachary*, 16 S.W.2d 590, 591 (1929).

The decision to submit a claim to binding arbitration is not merely a procedural or tactical decision. It is simultaneously a waiver of the right to a trial, a jury, and to an appeal. Due process requires court approval of an agreement to submit a minor's claim to binding arbitration. A court must independently evaluate the fairness of the arbitration procedure as well as determine whether the best

interest of the minor is truly served by the waiver of the right to a trial, a jury, and to an appeal.

As an officer of the court, the binding characteristic of the agreement to enter into binding arbitration must be the approval of the court, not merely the approval of the officer of the court, the guardian ad litem. Due process requires at least this.

The risk of error is great if guardians are permitted to waive the substantial rights of the minor without any court supervision. The best interests of the minor will not be served. The additional burden on the courts by providing this procedural safeguard is outweighed by the very significant interest of the minor. *Matthews v. Eldredge*, 424 U.S. 319, 334-335 (1976).

It is the obligation of the court, not the guardian ad litem, to ultimately guard the interests of a minor litigant.

2. The Constitutional Issue Affects Many Cases.

Whether an injured minor is given a fair opportunity to challenge the enforceability of a contract entered into on his behalf by his guardians ad litem is an issue that affects thousands of cases of minors across the country. Arbitration, while clearly a favorable alternative in some instances, is not always

in the best interest of the minor. Across the country, the claims of minor litigants are being diverted from the judicial to the arbitral arena. The protection of these minor litigants must be uniform.

Even a cursory review of the reported decisions discloses that there are differences between neighboring jurisdictions -- not to speak of the difference between California and New York -- over the protections that the Constitution affords in these circumstances.

This case is a particularly startling example of the gross inequity that results under this California rule. Due process requires that court approval be necessary for an agreement to enter into binding arbitration to be enforceable against a minor. The Due Process Clause of the Fourteenth Amendment is infringed by California's procedure.

CONCLUSION

For reasons of uniformity in the treatment of minors in the various states this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FILED
May 15, 1991
Court of Appeal-First App. Dist.
By: RON D. DARROW
DEPUTY

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

ZACHARY KAI ADLER, a Minor, etc.,	)	1991
Plaintiff and Appellant,	)	A049977
v.	)	Sonoma County Super.Ct.
KAISER FOUNDATION HEALTH PLAN, INC., et al.,	)	No. 153947
Defendants and Respondents.	)	

Zachary Kai Adler, a minor, by and through his parents acting as guardians ad litem, Kai Adler and Beverly Jean Adler, (collectively plaintiffs) appeals from a judgment confirming an arbitration award. (See Code Civ. Proc., §§ 1287.4, 1294, 1294.2.) The arbitrators found in favor of Kaiser Foundation Health Plan, Inc., and James Campisano, M.D., (collectively defendants) in plaintiffs' claim for injuries as a result of alleged malpractice in connection with minor plaintiff's birth. We conclude the arbitrators had the authority to decide the issues submitted to arbitration; consequently, we affirm.

Kai Adler and Beverly Jean Adler were appointed guardians ad litem for their minor son, Zachary Kai Adler, to pursue a medical malpractice action based on defendants' alleged failure to respond adequately to minor plaintiff's fetal distress, causing him to be born with severe and permanent birth defects. At all relevant times plaintiffs were members of the Kaiser Foundation health plan.

Defendants have consistently maintained that plaintiffs' allegations were subject to the arbitration provisions set forth in the medical and hospital service agreement of Kaiser's health plan. In determining plaintiffs were not required to arbitrate

their claims, this court issued a nonpublished opinion indicating defendants had engaged in a course of conduct inconsistent with the intent to invoke arbitration and had thereby waived the right to force plaintiffs into arbitration. (*Adler v. Kaiser Foundation Health Plan, Inc.* (June 23, 1988) A038414.) In accordance with our opinion, the matter was set for trial on December 6, 1988, but was continued to June 26, 1989. Because plaintiffs were eager to have the matter resolved, they finally agreed to withdraw the action from the active civil docket and submit their claims to binding arbitration. On June 22, 1989, the parties filed a stipulation, signed by respective counsel, indicating their desire to arbitrate plaintiffs' claims. In response, the Honorable Laurence K. Sawyer, Judge of the Superior Court, signed a written order staying the civil action, vacating the trial date, and ordering the matter to binding arbitration pursuant to the stipulation of the parties.

Arbitration was held over a five-day period in late 1989, during which the three arbitrators heard testimony, received evidence, and considered arguments. It is conceded that plaintiffs participated fully in these proceedings and at no time questioned the binding nature of the arbitration proceeding. Nevertheless, after the arbitrators' award was entered

in favor of defendants, plaintiffs responded to defendants' petition to confirm the award by asserting the arbitrators had no power to enter the award against the minor plaintiff. Plaintiffs argued the agreement to arbitrate "was voidable as to the minor plaintiff" because the superior court could only order the matter to arbitration after a verified petition was filed by the guardians ad litem and a noticed hearing held on whether arbitration was in the best interest of the minor. The court rejected these claims and entered a judgment confirming the arbitration award. In entering the challenged judgment, the trial court reasoned that because plaintiffs agreed to submit the matter to arbitration and fully participated without objection in the arbitration proceedings, they were estopped from attempting to disaffirm the award on the ground that certain statutory prerequisites to arbitration were not strictly complied with.

On appeal, plaintiffs argue the trial court could not invoke the theory of estoppel because defendants were never misled as to the true facts. In our view, whether the technical requirements of estoppel have been met by the facts herein is inconsequential. Independent of the theory of estoppel, a "party cannot gamble on a favorable outcome of a submitted issue and, having lost the

gamble, then attack the validity of his submission to the tribunal which decided the issue against him." (*Felner v. Meritplan Ins. Co.* (1970) 6 Cal.App.3d 540, 544; see also *Dugan v. Phillips* (1926) 77 Cal.App. 268, 276; *O'Malley v. Petroleum Maintenance Co.* (1957) 48 Cal.2d 107, 110-111.)

Plaintiffs voluntarily placed the validity of their medical malpractice claim against defendants in arbitration. There is no assertion made that the arbitration proceeding was deficient in any manner. In fact, plaintiffs' counsel admitted in proceedings below that "the arbitration was first class." Having thus submitted the issues for determination by the arbitrators, and having lost on the issues so submitted, plaintiffs' subsequent protests that the arbitrators were without authority to decide the controversy should be considered waived.

It is unnecessary to consider the merits of plaintiffs' contention that the court was required to make a formal determination, after holding a hearing and considering the verified petition of the guardian ad litem, on whether the submission of the minor's claim to binding arbitration was in the minor's best interest. Nevertheless, in order to remove any doubts about the propriety of the arbitration proceeding

conducted below, we will briefly address the merits of plaintiffs' argument.

A parent has the authority to bind his minor child to arbitrate the child's malpractice claims. In *Doyle v. Giuliucci* (1965)d 62 cal.2d 606, the father of a minor entered into a contract with a medical group which provided for arbitration of tort and contract claims arising under the contract. Thereafter, minor plaintiff claimed the medical group had committed malpractice ins rendering services to her. The matter was submitted to arbitration, but before a decision was rendered the minor's father was appointed as guardian ad litem for the minor child and a civil malpractice action was filed. At defendant's request, the civil action was stayed while arbitration proceedings continued. The arbitrators eventually rendered a decision in favor of the medical group. The minor plaintiff sought to vacate the award on the ground that she was not bound by her father's agreement to arbitrate any claims against the medical group.

In an unanimous opinion, the California Supreme Court, in *Doyle*, held that the minor was bound by the provision of the agreement to submit her malpractice claim to arbitration. "[T]he power to enter into a contract for medical care that binds the child to arbitrate any dispute arising thereunder is implicit in

a parent's right and duty to provide for the care of his child. [Citations]." (62 Cal.2d at p. 610.) Rejecting the contention that the arbitration clause unreasonably limited the minor's rights, the court observed, "The arbitration provision in such contracts is a reasonable restriction, for it does no more than specify a forum for the settlement of disputes." (*Ibid.*).

Plaintiffs seek to distinguish *Doyle* on the ground that it involved an arbitration agreement entered into before the acts giving rise to the malpractice claim. By contrast, plaintiffs herein agreed to arbitrate the matter after the minor plaintiff's injury occurred. Nothing in *Doyle* held or implied that the decision in any way rested on when the arbitration agreement was entered into, and plaintiffs have failed to present any logical reason why postinjury arbitration agreements should be given greater judicial scrutiny than preinjury arbitration agreements. The focal point of the court's analysis in *Doyle* was that implicit in a parent's duty to provide for the care of a child is the power to enter into an agreement which binds the child to arbitrate a malpractice claim. Based on the reasoning in *Doyle*, adult plaintiffs herein had the authority to bind their minor child to arbitrate his medical malpractice claim based on their right and duty to provide for his care.

Moreover, contrary to plaintiffs' assertions, there is no statutory authority requiring a verified petition be filed and a noticed hearing held on whether arbitration is in the best interest of the minor. The statutory provisions relied upon by plaintiffs govern the powers and duties of guardians and conservators of a minor's estate (see Prob. Code, §§ 2406, 2506) or cases where the parents seek to settle a minor's claim before litigation is commenced (see Prob. Code, § 3500). These provisions have no applicability to cases, like this one, where the minor's claim is the subject of pending litigation and the minor is appearing in the action through a guardian ad litem.

In such a case, the guardian ad litem has the right to control the procedural steps incident to the conduct of the litigation without court approval (*Cloud v. Market Street Ry. Co.* (1946) 74 Cal.App.2d 92, 101-103). Court approval is necessary only for actions which compromise or settle the minor's claim (Code Civ. Proc., § 372). In this case, the superior court was apprised of the parties' desire to arbitrate this controversy whereupon it issued a written order staying the civil action and ordering the matter to binding arbitration pursuant to the stipulation of the parties. Nothing more was required.

The judgment is affirmed.

LOW, P.J.

We concur:

KING, J.

HANING, J.

APPENDIX B

First Appellate District,
Division Five,
No. A049977
S021628

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

ZACHARY KAI ADLER, A Minor, Etc., Appellant

v.

SUPREME COURT
FILED
AUG 14 1991
Robert Wandruff Clerk
DEPUTY

KAISER FOUNDATION HEALTH PLAN INCORPORATED, Et Al.,
Respondents

Petition for review DENIED.

LUCAS
Chief Justice